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IN THE

Supreme Court of the United States

No. 712

THOGER GRONBORG JUNGERSEN,

Petitioner,

against

AXEL BROS., INC., A. BLUMSTEIN, INC., FEATURE RING CO., INC., O. M. RESEN, INC., HARRY ROSENBERG CO., INC., ROTHMAN & SCHNEIDER, INC., SKALET MFG. COMPANY, INC., ROBERT BADEN, GLADYS FOSS, HARRY BERLAND, SEYMOUR BERLAND, SHERLE BERLAND, JEAN BERLAND, JACOB FLYER, HERMAN FLYER, DAVID KLEBANOFF, SAM GROSSMAN, ARTHUR CELONA and SAM TOUR,

Respondents,

and

HARRY COHAN, MAX COHAN, DAVID SELIKOFF, LOUIS WITKIN, ALBERT FOSS, ANNIE BERLAND, LOUIS DOLGOV and ROSE BADEN,

Defendants.

PETITIONER'S REPLY BRIEF

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There is no disposition on the part of petitioner to belabor the points made in his petition; nor does petitioner wish to quibble on comparatively minor details.

This reply brief will be restricted to a short discussion of one or two observations made in respondents' brief which petitioner regards as dealing with essential matters.

The Affidavits

On page 3 of respondents' brief, the point is made that petitioner's answering affidavits on the motion for summary judgment do not indicate that the statements made therein were made on personal knowledge. Nowhere in respondents' supporting affidavits, is there any denial of fraud by those specifically and directly charged therewith. The complaint does not charge respondents' attorney with the fraud, but charges the defendants' themselves and Ostby & Barton Company. The papers in support of the motion for summary judgment are devoid of an affidavit by Sam Tour, by an officer of Ostby & Barton Company and by any one else charged with fraud.

Tour

On page 4 of respondents' brief is the statement that "with a single exception" Tour testified, in the *Baden* case, precisely as he had testified in the *Ostby & Barton* case in New Jersey. However, while Tour's testimony in the *Baden* case is set out as the "single exception", his testimony on the same point in the *Ostby & Barton* case is not given. In the latter case, Tour testified that during the 8 years he was with the Doehler Company he was "directly in the production end in connection with pressure die casting, in connection with plaster mold casting" and also with "some lost replica or lost wax process casting."*

In the *Baden* case Tour testified differently, namely, in referring to his work at the Doehler Company, that "I, as a metallurgist, was not a production worker, so naturally what I did in that type of work was experimental upon my part, because I was not a production employee in any casting department, whereas Mr. Kralund was plant superintendent at the time" (154; 461).

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* Page 146 A, folio 436, Ostby & Barton Company v. Jungersen, Transcript of Record, 335 U. S. 560.

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Pack Affidavit

With respect to the Pack affidavit discussed on pages 5 and 6 of respondents' brief, the statement is made that in the second Pack affidavit Pack "admitted" that Kralund and Tour had "worked together" at Doehler. What the second Pack affidavit actually says (103; 307 to 309) is as follows:

> "Mr. Kralund and Mr. Sam Tour undoubtedly were acquainted and they did work in the same plant at the same time".

Then the Pack affidavit states that Tour's "assigned" duties at Doehler may have been "somewhat broader" than those stated in the first Pack affidavit. The first affidavit states (97; 289) that at no time since the Kralund patent had been abandoned did Mr. Kralund do any experimental work at the Doehler Company on wax castings and that at no time was Mr. Tour under the direction of Mr. Kralund nor did he at any time collaborate with Mr. Kralund on any research or experimental work. Mr. Pack's second affidavit, which states that Mr. Tour's "assigned" duties may have been "somewhat broader", refers to his assigned duties as a metallurgist (97; 290). The second affidavit does not in any sense change or weaken Mr. Pack's original statements that Tour had nothing to do with the Kralund patent, either experimentally or in production. His statement in the second affidavit that Kralund and Tour might have "talked" of the process cannot justify the statement in respondents' brief, on page 5, that Kralund and Tour "worked together" at Doehler.

Respondents claim they had no chance to cross-examine Mr. Pack. If they really desire such opportunity, they may have it on a trial. Their motion for summary judgment is inconsistent with their claimed desire to do so.

Equity

Petitioner did not institute this action to relitigate the validity of his patent. He instituted the action because of a rule of law, basic to our jurisprudence, that a party who seeks the court's aid in equity must be open and above-board in his dealings with the court, and that if in the course of seeking that aid a party abuses the court's confidence, presents planned perjurious testimony, such a party may neither receive aid from the court of equity nor retain aid previously received. That is the reason the statement is made in the petition at pages 37 and 41 that petitioner is not concerned with the validity of the patent at this time and that speculation upon relitigation of the issue of patent validity has no place in this type of action.

Respondents' brief denies none of the accusations of fraud, nor, for that matter, did any of respondents' affidavits on summary judgment. Respondents' brief restricts itself to a tacit admission of the existence of the fraud, but claims that even without the fraud, the judgment of invalidity would have been warranted. Its position that the fraud was immaterial to the original judgment of invalidity cannot defeat petitioner, nor can it justify the fraud practiced upon the court.

Hazel Case

Respondents' discussion of the *Hazel* case misses the point. The *Hazel* case did not involve perjurious sworn testimony planned and given in the course of a trial. It involved merely a substantially factually true article attributed to a false author. The Circuit Court in that case said what respondents now say, that even without the article their decision would have been the same. This Court said, in effect, that that is no criterion; that since

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Hartford, in the *Hazel* case, thought the article material, it is in no position to dispute its effectiveness. In this case the defendants thought Tour's testimony was material and, as we have seen, it actually was so. They, also, are in no position to dispute its effectiveness. In the *Hazel* case this Court found a "deliberately planned and carefully executed scheme to defraud not only the patent office, but the Circut Court of Appeals". In this case we find a deliberately planned and carefully executed scheme to defraud the United States District Court.

Conclusion

Respondents' request to this Court to deny certiorari is in effect a request to protect them against exposure and the inevitable results of exposure. Their opposition to this petition is in effect a request for an endorsement of planned perjury and fraud as a method of misguiding and imposing upon our courts. If the respondents are guilty of no such reprehensible activity, they should be the first to insist upon a full and fair trial of the issues, in order that whatever taint attaches to their activity may be removed. Instead of adopting that procedure, they say to the Court that while we may have imposed upon you through the presentation of fraudulent testimony, you did not rely upon that fraudulent testimony and therefore we should be absolved of any wrongdoing. Such a novel and amazing request should be dealt with in the only manner open to this Court, namely, granting petitioner's Writ of Certiorari.

Respectfully sumbitted,

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